(2)

# NO: 91-367

Supreme Court, U.S.
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IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAROL ANKENBRANDT,
AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,
PLAINTIFF, APPELLANT, PETITIONER

VS.

JON A. RICHARDS AND DEBRA KESLER,
DEFENDANTS, APPELLEES, RESPONDENTS

## JOINT RESPONSE OF JON A. RICHARDS AND DEBRA KESLER, IN OPPOSITION, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT OF APPEAL FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

DID THE DISTRICT COURT PROPERLY APPLY AND APPLY THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION AND THE ABSTENTION DOCTRINE MANIFESTED BY YOUNGER V. HARRIS, 401 U.S. 37, 91 S.CT. 746 (1971) WHEREIN IN ORDER TO TREAT THE COMPLAINT, THE DISTRICT COURT WOULD HAVE TO ACT AS A COURT OF REVIEW FOR THE STATE PROCEEDINGS AND RE-VISIT, RE-EVALUATE, RE-EXAMINE EVIDENCE CONCERNING A DOMESTIC SITUATION AND CIRCUMSTANCES, AND ACT AS A COURT OF REVIEW CONCERNING THE RELATIONSHIP BETWEEN PARENT AND CHILD THEREBY RISKING A CONFLICTING RESULT AND VIOLATE THE FUNDAMENTAL PRINCIPLES OF COMITY.

## PARTIES TO HIS PROCEEDINGS

PLAINTIFFS::

Carol Ankenbrandt

Lorelei Richards, her minor daughter

Stephanie Richards, her minor daughter

DEFENDANTS:

Jon A. Richards

Debra Kesler



## TABLE OF CONTENTS


| | |
|---|---|
| QUESTION PRESENTED..... | i |
| PARTIES TO THESE PROCEEDINGS.... | ii |
| TABLES OF AUTHORITIES..... | iv |
| DECISIONS BELOW..... | v |
| GROUNDS FOR JURISDICTION..... | v |
| RELEVANT PREMISES..... | v |
| STATUTE INVOLVED..... | vi |
| STATEMENT OF THE CASE..... | 1,2 |
| REASONS FOR DENYING THE APPLICATION.. | 3-21 |
| CONCLUSION..... | 22 |

## TABLE OF AUTHORITIES

Bacon v. Bacon, 365 F.Supp. 1019 (D. Ore. 1973)..... 17

Casida v. Casida, 580 F.Supp. 857 (D. Colo. 1984)..... 21

Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976)..... 21

Ex parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890)..... 8,16

Goins v. Goins, 777 F.2d 1059 (5th Cir. 1983)..... 18

Jagiellia v. Jagiella, 647 F.2d 561 (5th cir. 1981).....8,17,19

Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989).....6,8,15,16,18

Short v. Short, 730 F. Supp. 1037 (D. Colo. 1990)..... 18,19

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)..... i,vi,1, 9, 20,21



## DECISION BELOW

TRIAL COURT:

ANKENBRANDT V. RICHARDS, NO. 89-4244, United States District Court, Eastern District of Louisiana, Judgment rendered on December 10, 1990. Not reported in F.Supp. (1990 WL 211545 {E.D. of LA.}). See Petitioners' Appendix, A-3 to A-6.

ON APPEAL:

ankenbrandt v. richards, No. 91-3037, United States Court of Appeals for the Fifth Circuit, District Court Judgment affirmed on May 31, 1991). Not Published under Local Rule 47.5. See Petitioners Appendix, A-2.

## JURISDICTION

Jurisdiction is vested in this Honorable Court by virtue of and pursuant to 28 U.S.C. Sec. 1254(1), Sec. 2101(c). The opinion of the Fifth Circuit Court of Appeals, in this matter, on May 31, 1991. See Petitioners Appendix, A-2. No rehearing was sought by Petitidner.

## RELEVANT PREMISES

1) THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION.

2) THE ABSTENTION DOCTRINE, COMITY, AS SET OUT BY YOUNGER V. HARRIS, 401 U.S. 37, 91 S.CT. 746 (1971).

## STATUTE INVOLVED

28 U.S.C. SEC. 1331
((DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS)

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between
>
> > (1) citizens of different states;
> >
> > ....



## STATEMENT OF THE THE CASE

This action was filed on September 26, 1989, with Jurisdiction based on diversity of citizenship. Defendant, Kesler, answered on November 6, 1989, denying, specifically, each and every allegation of the complaint. Defendant, Richards, answered on February 13, 1990, denying, specifically, each and every allegations of the complaint. Kesler and Richards challenged the subject matter jurisdiction in their answers. An amended complaint was filed on May 25, 1990, amending dates. On October 29, the defendants, Kesler and Richards, jointly, filed a Motion To Dismiss, concerning: The Domestic Relations Exception and the Abstention Doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). Plaintiffs, L.R. and S.R. filed an opposition on November 16, 1990. The matter was decided, without oral argument, on the

written Memorandums submitted, by both, the Plaintiff and the Defendants. The Honorable George Arceneaux, District Judge, Presiding, granted the Motion and Dismissed the Complaint, without prejudice. Written reasons were assigned. Judgment of Dismissal was entered on December 10, 1990 (See Plaintiffs' Appendix, A-3 thru A-6).

Plaintiffs timely noticed an appeal, on January 8, 1991, to the United States Fifth Circuit Court of Appeals. On May 31, 1991, the Fifth Circuit affirmed the judgment in a per curiam opinion (See Plaintiffs' Appendix, A-2).



## REASONS FOR DENYING THE APPLICATION

Petitioners request this Honorable Court to grant a Writ of Certiorari premised upon the following:

1) This decision in conflict with other decisions of various circuit courts of appeal on the same matter; and,

2) The decision of the District Court and its affirmance by the Fifth Circuit Court of Appeals represents an important question of Federal Law which has not been, but should be, decided by this Court.

For the reasons and premises cited below this supposed controversy does not merit the attention or review by this Honorable Court and the Petition for Writ of Certiorari should and ought to be dismissed, forthwith.

First, it is necessary to clear up either a misconception possessed by the Petitioners' Attorney or an attempt to

mislead this Honorable Court, when he states in his application on page 6, last paragraph thereof, to-wit:

> "The federal court jury would hear medical and psychological evidence of the abuse, and determine damages. The 'fitness' of Richards would not be an issue, except for the obvious observation that a child molester is not a fit parent."

No one is entitled to that observation, without full proof in these proceedings.

In fact and truth the Federal District Court would review the issues and factors and evidence presented to the State Courts, including but not limited to Richards' fitness as a parent and the injustice that has been imposed upon him. Evidence of how far a vindictive wife can go in punishing her husband because he has fallen in love with a younger woman, will be relevant and pertinent. There is no res adjucata or collateral estoppel here, as to any of the



issues or facts. Defendant, Richards is going to win this one because of the simple reason Richards can defend himself, now; something he could not do in the State Juvenile Court. At that time, he was facing Criminal Charges, in two prosecutorial jurisdictions, and upon advice of his attorney did not attempt to present an affirmative defense, intelligently reserving such defense to defeat charges which could have resulted in his imprisonment for a long, long time. These charges are no longer a consideration, such charges turned out to be frivolous and without cause. Richards, being unfettered, will, in these proceedings, demand that his fitness as a parent be examined and the injustice imposed upon him be offset, thereby.

Second, on page 7, last paragraph, thereof, Petitioners state, to-wit:

> "...if suit had been brought only against defendant Kesler, the court would have jurisdiction."

In fact and truth if suit had been brought only against Kesler, Plaintiffs' Attorney knows better than anyone the suit would have been dismissed for being frivolous and he would have been sanctioned. Kesler is in this suit for one reason and one reason, only, and that is so Plaintiff's Attorney, whose was the same attorney who appeared for the Plaintiff in Rogers v. Janzen, 891 F2d 95 (5th Cir. 1989), was afraid that the contrived "State Border" would not defeat the "Domestic Relations Exception" and needed a non-immune co-defendant so he could make the statement referred to above.

Now turning to the so-called conflict between the circuits, Respondents point out that none of the cases cited by Petitioner establishes a conflict. No case cited by



the Petitioners places the Federal Courts in the position of having to sit as a Court of Review or Appeal and grant a "Trial De Novo" concerning state court adjudications.

A simple reading of the cases establish the tort complained of occurred after and independent of the domestic proceedings or did not involve elements of comity. Nothing cited to this Honorable Court establishes a true conflict. At best, different approaches are suggested. Each circuit, presented with the peculiar facts of the other circuit, would, more likely than not, arrive as the same result. No case cited by Petitioners involve an obviously contrived State Border, in an attempt to secure Federal Jurisdiction in an otherwise totally State Domestic situation.

## FEDERAL COURTS OUGHT NOT TO BE IN THE BUSINESS OF PROVIDING A FORUM FOR A TRIAL "DE NOVO" OF STATE PROCEEDINGS

There can be no question that the District Court was correct in recognizing that it would be providing a "Trial De Novo" Court for the State Court. Not only that, but comity and the Younger Doctrine has to be recognized as a valid use of the Court's discretion and good sense, in this matter.

The District Court applied the Law and the Jurisprudence correctly and properly, as affirmed by the Fifth Circuit Court of Appeals, when:

a) It applied the Domestic Relations Exception and dismissed the complaint. Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890); Jagiellia v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1985); and,



b) It applied the concept of Comity Abstention Doctrine manifested in Younger v. Harris, 401 U.S. 37, 91 s.Ct. 746 (1971).

The complaint, concerned herein, was filed as a tort suit, in diversity, naming Debra Kesler and Jon A. Richards as Defendants. Said complaint contains allegations of child abuse, raised for the first time, after eight years of marriage, in a domestic custody fight. Such allegations were treated in the Louisiana divorce Proceedings and Proceedings in the Juvenile court system, State of Louisiana. Carol Ankenbrandt presently has custody of L.R. and S.R.. Jon Richards' parental rights have been terminated by a decree of the Juvenile Court, Parish of Jefferson, State of Louisiana (See Petitioners' Appendix A-18 & A-19). The State's Court's litigation has been adjudicated, on these issues. It is true that Richards did not

affirmatively defend himself in these proceedings. The Judgment of Termination of Parental Rights was not Appealed by Richards. It is also true that it was not affirmatively defended and wasn't appealed because two Prosecutorial Jurisdictions were considering criminal charges, calling for substantial imprisonment, against him, during the time of the Juvenile Proceedings. His legal advice was not to disclose his defense but reserve it to fight the felonies. The Jaws of this Prosecutor's vise is a standard technique, used by Prosecutors, and had the desired effect of prohibiting Richards from presenting an affirmative defense in the Juvenile Proceedings, since the Juvenile Court would not stay its proceedings, to allow the criminal charges to be disposed of; why this is so, offends any fair minded and decent lawyer; nevertheless, this



Prosecutors' "Left Handed Blackmail" does wonders for prosecutors.

Richards was in the Jaws of a Prosecutorial Oppressive Vise. He could not defend himself in the Juvenile Proceedings for fear of disclosing evidence of the defense which could keep him from being imprisoned on the threatened felony charges, placing Richards in a "HOBSON'S CHOICE": lose the Juvenile Proceedings and successfully defend the Felonies or Win the Juvenile Proceedings and subject his Felony Defenses to the sabotage of subsequent falsehoods by his accuser, the vindictive wife, such as re-arranging dates, altering descriptions of events and adding new allegations. When the State was called upon to "put up" on the Felony charges, it could not produce, because it knew what Richards did not know; the State was in possession of evidence which vindicated Richards of

any abuse charges. The State had been misbehaving the whole time. In fact and truth, the State actually had, in its possession, evidence, during the Juvenile Proceedings which would have cleared Richards. So, the Juvenile Proceedings are going to be set aside, after this litigation is disposed of, one way or the other. How do we know this to be true? Richards is here, answering this suit and responding to this Application, with no convictions for child abuse or otherwise; if this were not true, the Petition would have alleged his convictions and no money would have been spent for printing this response, Richards would be "<u>under the Jail</u>".

**<u>RE: THE STATE'S INTEREST</u>**

Now, nothing could be more involved in domestic relations than:

1) A divorce; and,



2) A custody battle where charges of sexual abuse, hurled by wife, against the husband and father, for the very first time, upon visitation during the separation, after eight (8) years of marriage; and,

3) The new girlfriend and present wife is alleged to be involved.

During the course of the Domestic situation surrounding Carol Ankenbrandt, Jon Richards, L.R. and S.R., they were involved in litigation in several state courts and agencies, to-wit:

a) State Courts:

1) Civil District Court, Parish of Orleans, State of Louisiana; separation, divorce and child custody; and,

2) Juvenile court, Parish of Jefferson, State of Louisiana; Child in need of care proceedings; an action to terminate parental rights of Jon A. Richards and Custody of the children; and,

3) Fourth Circuit Court of Appeal; and,

4) Fifth Circuit Court of Appeal; and,

5) Louisiana Supreme Court.

b) State and Parish Agencies:

1) District Attorney's Office, Parish of Orleans, Louisiana; and,

2) District Attorney's Office, Parish of Jefferson, Louisiana; and,

3) New Orleans Police Department Investigation of Child Abuse; and,

4) Jefferson Parish Sheriff's Office, Investigation of child abuse; and,

5) Office of Community services, Child Sexual Abuse Unit; this entity is a State arm of the Child Protection services, represents the State before the Juvenile Court and it is required by State Statute to perform its own investigation of allegation of abuse.

Sometime during the course of the events, in the Domestic Situation, Carol Ankenbrandt, with the children, place a State Border between herself and the Louisiana Domestic Situation. Relying on



that Border brought this Diversity Action, sounding in tort.

In the words of the Fifth Circuit, affirming the District Court's decision to abstain in Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989), stating the Abstention Doctrine is applicable, in such a situation and the District Court properly applied the Doctrine, to-wit:

"..., its resolution would require the type of inquiry into the parent-child relationship that is better conducted by State Courts. At the heart of Rogers' suit is the allegations that Gray was sexually abused their daughter, an allegation that was considered by the Juvenile Court in awarding custody and Rogers visitation rights. (Citing La. Civ. Code Ann. Art. 147 [West Supp. 1989]). In order to supply the requested relief, a federal district court would be required to revisit the factual determination made prior to awarding custody, and if it reached a contrary conclusion to unsettle the basis of the custody and visitation decision. . . in the end, such a result would no doubt prompt a suit by Rogers for custody and visitation reconsideration. . . thereby encroaching on the apparent state interest

in determining custody and risking incompatible federal and state decrees. (Citing Rykers v. Alford, 832 F.2d at 899-90)."
Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989).

The District Court Judge, the Honorable George Arceneaux, did in his "Order and Reasons", in this matter, correctly recognized the Domestic Relations Exception was applicable, to-wit:

> "The Federal Courts have for a century recognized 'that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State and not to the laws of the United States.' Ex parte Burrus, 136 U.S. 586, 594, 10 S.Ct. 850, 853 (1890). The domestic exception is founded on this state interest in domestic matters, as well as to avoid the possibility of conflict in state and federal decrees in matters under the state continuing jurisdiction and to avoid the unnecessary cluttering of the Federal dockets. Couch v. Couch, 566 F.2d 486,487 (5th Cir. 1978)." See Order and Reasons, Petitioners' Appendix, A-4.



In Jagiella v. Jagiella, 647 F.2d 561 (5th cir. Unit B, 1981) the Court cited, with approval, the language from Bacon v. Bacon, 365 F. Supp. 1019 (D. Ore. 1973), to-wit:

> "Stripped of its verbiage, this is no more-than-no less-than a domestic relations case. While it may true, as Plaintiff's counsel has urged, that there are instances where estranged parties may properly sue each other in Federal Court, this is not one. . . . The language of the complaint shows this to be part of an on going series of disputes centering around a dissolved but still stormy relationship and the status of and harm to their children.
> . . . . [I]f this case were allowed to be maintained, United States District Courts would be deluged with domestic relations cases, all containing initially colorable tort claims of 'extreme and outrageous conduct resulting in severe emotional distress' where the parties have placed [a state border] between themselves in an attempt to escape each other.
> For this and other policy reasons, a judicial exception to Federal Jurisdiction as been created with respect to intrafamily feuds." 365 F.Supp. 1020.

It becomes readily apparent that Federal District Courts are not going to ignore the fact that State Courts are more tuned to and competent to treat this type of litigation than Federal Courts and when the risk of interference between the State and Federal Court Systems, and the possibility of contradictory and overlapping rulings are considered, it becomes sensible that the Abstention Doctrine be invoked. Goins v. Goins, 777 F.2d 1059 (5th Cir. 1983).

The Federal District Court for the District of Colorado, in Short v. Short, 730 F.Supp. 1037 (D. Colo. 1990), cites Rogers v. Janzen, 891 F.2d 95, 97-99 (5th cir. 1989) for the following premise, to-wit:



> "Because plaintiffs' claim would necessitate a re-evaluation of issues and evidence properly presented and addressed in the State Court proceedings, this suit clearly falls within the domestic relations exception to Federal Jurisdiction." Short v. Short, 730 F.Supp 1037 (D. Col, 2/9/90).

AND,

> "as in Bacon, here appellant's allegations regarding the alienation of his children's affection grow out of the 'dissolved but still stormy relations of the parties', The District court therefore acted correctly in dismissing the counterclaim." Jagiella v. Jagiella, 647 F.2d 561 at 565.

Footnote 4 of the District Court's Order and Reasons, hits the nail on the head, in regard to Plaintiff's contention that the State's interest is at an end, to-wit:

> "The prospects of the jury finding a different result than that found by the state court, would invite Richards to request the reconsideration of his parental status. This request, no matter the likelihood of its success, would most definitely fall to the state court. Accord Rogers v. Janzen, 891 F.2d 95, 98 (5thCir. 1989); Rykers v. Alford, 832 F.2d 895 (5th Cir. 1987)." See Petitioners' Appendix, A-5, footnote 4.

As long as water runs downhill and grass is green the state court will be involved in this matter, in the future, until there is a re-instatement of the Parental rights to Richards.

RE: YOUNGER V. HARRIS

The District Court, also took notice, as did the Fifth Circuit Court of Appeals, of the Abstention Doctrine as manifested by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) recognizing acceptance of jurisdiction, in this matter, would violate fundamental principles of comity and such



principles compel the court to decline to exercise jurisdiction, to-wit:

> "In addition to the Domestic Relations Exception, the defendants raise in their motion the general abstention doctrine under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). Abstention, that doctrine designed to promote federal-state comity, is required when to render a decision would disrupt the establishment of a coherent state policy.' Zaubi v. Hoejme, 530 F.Supp. 831, 836 (W.D. Pa. 1980) (Citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976). See Petitioners Appendix, A-6.

As was said in Casida v. Casida, 580 F.Supp. 857 (d. Col. 1984), to-wit:

> "It is painfully apparent from a reading of the complaint that the dispute between the parties, no matter how labeled, is essentially one arising with respect to the provisions of a . . . custody agreement, visitation rights and other incidents of a matrimonial dispute."

## CONCLUSION

In view of the premises recited hereinabove this Honorable Court should and ought to deny review of the Petition for Certiorari and dismiss same, forthwith.

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